

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

JOHN AITKEN,

Petitioner,

VS.

UNITED STATES OF  
AMERICA,

Respondent.

Case No. CV 13-6244 R (MRW)

## ORDER DISMISSING ACTION

The Court vacates the reference of this action to the Magistrate Judge and dismisses the action without prejudice.

\* \* \*

This is a habeas action involving a federal prisoner currently housed at FCI Terminal Island. Petitioner filed his action under 28 U.S.C. § 2241 to challenge aspects of the sentence that a federal court in Nevada imposed based on Petitioner's guilty plea to a fraud charge. (Docket # 1.)

In September 2013, the government moved to dismiss the action on jurisdictional and venue grounds. (Docket # 5.) The government asserted that Petitioner's action should have been filed under Section 2255 in the district of his

1 conviction. The government further contended that Petitioner did not qualify for  
2 consideration of his claims in this district because his action did not fall within the  
3 limited “escape hatch” of Section 2255. (Docket # 5 at 2-5.)

4 The Court (Magistrate Judge Wilner) ordered Petitioner to respond to the  
5 motion by October 29, 2013. (Docket # 7.) The Court expressly informed Plaintiff  
6 that the action would be dismissed under Federal Rule of Civil Procedure 41 if  
7 Plaintiff did not respond to the government’s motion. Petitioner failed to file any  
8 response or opposition to the motion. The Court subsequently issued an order to  
9 show cause why the action should not be dismissed or considered to be unopposed  
10 under the Local Rules of Court in December 2013. (Docket # 8.) Petitioner again  
11 did not respond to the Court’s order or the government’s motion.<sup>1</sup> To date,  
12 Petitioner has failed to file anything with the Court after the submission of the  
13 dismissal motion

14 \* \* \*

15 Central District of California Local Rule 7-9 requires a party to file a  
16 memorandum stating the basis for that party’s opposition to a motion. Local Rule  
17 7-12 states that the “failure to file any required document [ ] may be deemed  
18 consent to the granting or denial of the motion.” Pursuant to these Local Rules, the  
19 Court considers the government’s dismissal motion to be unopposed based on  
20 Petitioner’s failure to file any opposition. On that basis, the motion should be  
21 granted.

---

22  
23  
24  
25 <sup>1</sup> The Court independently confirmed via the Bureau of Prison’s  
26 website that Petitioner is currently housed at the facility listed on the docket.  
27 Additionally, the Court notes that it previously denied relief to Petitioner in another  
28 habeas action challenging his sentence. Aitken v. United States, CV 13-3631 R  
(MRW) (C.D. Cal.).

1 Dismissal is also appropriate under Federal Rule of Civil Procedure 41(b).  
2 Rule 41 permits dismissal for failure to prosecute or to comply with a court order.  
3 The Court may order dismissal pursuant to Rule 41 sua sponte. Link v. Wabash  
4 R.R., 370 U.S. 626, 629-30 (1962). Dismissal of a civil action under Rule 41 may  
5 be appropriate to advance the public's interest in the expeditious resolution of  
6 litigation, the court's need to manage its docket, and to avoid the risk of prejudice  
7 to defendants. Omstead v. Dell, Inc., 594 F. 3d 1081, 1084 (9th Cir. 2010); Ferdik  
8 v. Bonzelet, 963 F.2d 1258, 1263 (9th Cir. 1992). Additionally, a court should  
9 consider the public policy favoring disposition of cases on their merits and the  
10 availability of less drastic alternatives in its evaluation. Carey v. King, 856 F.2d  
11 1439, 1440 (9th Cir. 1988).

12 In the present action, the Court finds dismissal is appropriate. Petitioner  
13 failed to comply with the Court's clear and direct instructions to respond to the  
14 government's motion. (Docket # 7, 8.) As a result, the Court concludes that  
15 Petitioner does not wish to advance his case here. By contrast, the Court, the  
16 government, and the public have a strong interest in terminating this action.  
17 Furthermore, because Petitioner is a pro se litigant who failed to respond to the  
18 government's motion, the Court's scheduling order (which specifically informed  
19 Petitioner of the potential for dismissal of the action under Rule 41), and the  
20 Court's order to show cause, no sanction short of dismissal will be effective in  
21 moving this case forward. Carey, 856 F.2d at 1440. The Court finds that dismissal  
22 is appropriate under Rule 41(b).

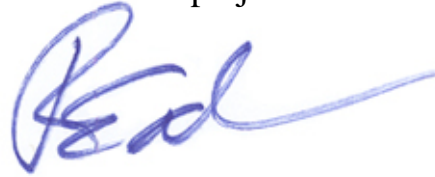
23 Finally, this dismissal is consistent with the reasoning in Heinemann v.  
24 Satterberg, 731 F.3d 914 (9th Cir. 2013). In Heinemann, the Ninth Circuit held  
25 that a district court may not grant summary judgment and make findings of fact  
26 under a local rule simply because a summary judgment motion was unopposed.  
27 However, in the present action, the Court makes no factual findings regarding the  
28

1 merits of Petitioner's claims; rather, his failure to respond to the motion is  
2 sufficient to warrant acceptance of the government's legal analysis of Plaintiff's  
3 claims.

4 Accordingly, this action is DISMISSED without prejudice.

5 IT IS SO ORDERED.

6  
7 DATED: \_January 21, 2014\_



8 HON. MANUEL L. REAL  
9 UNITED STATES DISTRICT JUDGE  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28